**LEE KOR FAN & SONS SDN. BHD.**

**v.**

**MAT SAID LEBAI ALI & ORS.**

HIGH COURT MALAYA, IPOH
AJAIB SINGH J
[CIVIL SUIT NO. 358 OF 1979]
12 MARCH 1983

***CONTRACT:*** *Specific performance - Whether contract binding - Capacity - Non-compliance of Mining Enactment - Sections 48(i), 57(i) (b) - Whether contract tainted with illegality - Counter-claim - Rescission - Damages - Declaration of ownership.*

The plaintiffs sued for specific performance of an agreement dated 6 May 1977 entered into by them with the 1st defendant in respect of two pieces of land. The agreement was to allow the plaintiffs to prospect for tin-ore in the land which belonged in equal shares to the 1st defendant and his late wife and thereafter to allow the plaintiffs to exercise an option to take a sub-lease over the land. In the agreement the 1st defendant described himself as the representative of the estate of his deceased wife. By a distribution order made by the Collector on 12 March 1979, the deceased wife's share was distributed to the first six defendants and on 19 March these shares were registered in their respective names. On 21 March 1979, the six defendants entered into an agreement to sell their land to the 7th defendant. The plaintiffs claimed for specific performance. The first six defendants claimed for rescission and damages, the 7th defendant for damages and a declaration that he was the registered owner of the land.

**Held:**

**[1]** The 1st defendant had no capacity to deal with the property of his deceased wife without having taken out letters of administration.

**[2]** There was insufficient evidence to show that the agreement with the plaintiffs had been entered into with the knowledge, implied or express, and consent of all the other beneficiaries.

**[3]** The non-compliance by the plaintiffs with the provisions of the Mining Enactment did not taint their agreement with the defendants, only that it cannot be enforced because of the lack of capacity of one of the parties.

*[Claim dismissed. Counterclaim allowed but no damages awarded.]*

**Legislation referred to:**
Mining Enactment (FMS Cap 147), ss. 48(i), 57(i)(b), 123
Probate and Administration Act 1959, ss. 60(4), (5)

*For the plaintiffs - N.T. Rajah; M/s. Maxwell, Kenion Cowdy & Jones*
*For the 1st defendant - Lal Chand; M/s. Kamaluddin Maamor & Co.*
*For the 2nd - 6th defendants - J.R. Devadas; M/s. Devadas & Co.*
*For the 7th defendant - Daniel Tay; M/s. Concisom & Tay*

**JUDGMENT**

**Ajaib Singh J:**

The plaintiffs in this case sued the defendants for specific performance of an agreement dated 6 May 1977 entered into by them with the 1st defendant in respect of two pieces of land. The 4th defendant died on 7 July 1980 and was substituted by Mariee bin Pandak Abdul

Rahman by order of Court dated 30 March 1981. The agreement was to allow the plaintiffs to prospect for tin-ore in the land which belonged in equal shares to the 1st defendant and his late wife and thereafter to allow the plaintiffs to exercise an option to take a sub-lease over the land.

In their amended statement of claim the plaintiffs alleged that the 1st defendant was the registered and beneficial owner of one half interest in land held under HS(D). Ka 449/73 and Ka 450/73 for Lot Nos. 65312 and 65313 respectively whilst the other one half was registered in the name of the 1st defendant's late wife. Defendant nos. 2 to 6 are the beneficiaries of the deceased wife's estate. The plaintiffs alleged that

> on 6 May 1977 the 1st defendant for himself and as representative of his wife Lailan binti Pandak Abdul Rahman deceased @ Lilan binti Pandak Abdul Rahman @ Lehlan w/o Mat Said deceased with the knowledge and consent of the other defendants to this action entered into an agreement with the plaintiffs whereby the defendants agreed to the plaintiffs entering upon and prospecting the said lands for tin ore with an option to take a sublease over the said lands upon the issue of a mining title thereover. Subsequent to the said agreement the plaintiff company prospected the said lands and duly exercised the option to take a sublease thereover.

It was also alleged that

> the defendants obtained possession of the titles to the said lands from the plaintiffs' solicitors under the pretext that the titles were required for transmission purposes and in breach of the said agreement, entered into an agreement of sale of the said lands to 7th defendant.

The plaintiffs accordingly claimed specific performance of the agreement of 6 May 1977 and damages against all seven defendants.

In his statement of defence and counterclaim the 1st defendant stated that he was the registered owner of 5/8 undivided share in the two pieces of land and that he now had no beneficial interest therein as he had sold the same to the 7th defendant. The remaining 3/8 undivided share was registered in the names of defendants Nos. 2 to 6 and this 3/8th undivided share has also been sold to the 7th defendant. The 4th defendant was the mother-in-law of the 1st defendant and defendants Nos. 2, 3, 5 and 6 are the children of the 1st defendant and they are together with the 1st and 4th defendant (now substituted) the beneficiaries of the estate of the 1st defendant's late wife.

The 1st defendant admits signing the agreement of 6 May 1977 with the plaintiffs but alleges that the plaintiffs had an unfair advantage over him as he did not have the benefit of legal advice. He also denied that he signed the agreement with the implied or express knowledge and consent of the rest of the beneficiaries. He also averred that he was incapable in law of making a valid agreement and therefore the agreement was void and unenforceable. He denied that he was the representative of the estate of his wife and this fact was known to the plaintiffs at all material times. He also stated that he was not required and did not make any application for a prospecting permit. The plaintiffs did not have any permit to prospect the land and this permit was a condition precedent to the prospecting and subsequent exercise of the opinion. If the plaintiffs had prospected the land then it was in breach of the agreement and illegal in that in contravened the Mining Enactment.

The 1st defendant admits that he had entered into an agreement with the 7th defendant but denied that it was in breach of the agreement with the plaintiffs. He states that he had been in possession of the title deeds at all material times and denies that he took possession of

the title deeds as alleged by the plaintiffs. In his counterclaim the 1st defendant prayed for recission of the agreement dated 6 May 1977 and damages for breach of contract and inconvenience.

The defence of the 2nd, 3rd, 5th and 6th defendants was that they sold their land to the 7th defendant in their own right as their shares and those of the 1st and 4th defendants were registered in their respective names on 19 March 1979. They denied that the agreement entered into between the 1st defendant and the plaintiffs was done with their knowledge and consent and they denied that the 1st defendant was their agent or representative. They also averred that the agreement describing the 1st defendant as representative of the estate contravened the provisions of s. 60(4) of the Probate and Administration Act 1959 and that

> under s. 60(5) of the said Act, the defendants and each of them avoid and repudiate the attempted disposal of their property by the first defendant to the plaintiff under the said agreement.

These 4 defendants also counterclaimed for an order to rescind the agreement of 7 May 1977 and alternatively that the said agreement be held void and ordered to be delivered and cancelled. They also claimed damages.

In his statement of defence the 7th defendant averred that he had purchased the land from the defendants under contract in writing dated 31 March 1979 made between him and the rest of the defendants. A memorandum of transfer was legally executed by the parties on the same date and the balance of the purchase price under the terms of the agreement was paid on 2 June 1979. The 7th defendant averred that he had

> no actual, constructive or imputed notice either before or at the time of the said contract of sale or the execution of the Memorandum of Transfer or the payment of the balance of the purchase price of the existence of the plaintiffs' right by virtue of which the plaintiffs claim.

The 7th defendant further averred that he has been in possession of the land since 21 March 1979 and in possession of the documents of the titles thereto. He alleged that the plaintiffs have by their laches or delay lost their right to specific performance of their agreement with the 1st defendant. In his counterclaim the 7th defendant averred that he has suffered damage by reason of the lodging of a caveat by the plaintiffs on the land on 21 May 1979 and he seeks damages and a declaration that he is the registered owner of the land free from all encumbrances.

In their reply to the defence and counterclaim the plaintiffs deny that the defendants have suffered loss or damage and they deny that they had entered the caveat wrongfully. The plaintiffs reiterate that the agreement of 6 May 1977 is a binding agreement between them and the 1st defendant.

The evidence adduced in this case both oral and documentary is fairly lengthy and I do not intend to delve into it in great detail. After giving due consideration to all the evidence and the submissions advanced on behalf of the parties I came to the conclusion that the plaintiffs had failed to prove their case against the defendants. The two pieces of land were transferred to the 1st defendant and to his wife in equal undivided shares on 3 June 1975 by the previous owners. The wife died intestate on 3 September 1976 and without having taken out Letters of Administration of the estate of his wife the 1st defendant entered into an agreement with the plaintiffs on 6 May 1977 wherein he described himself as the representative of the estate of the deceased wife. The 1st defendant as such had no capacity to deal with the property of the deceased wife and therefore he was in no position to enter into any agreement affecting

the undivided land. On this ground alone the plaintiffs failed as they were not in a position to enforce the agreement which had been improperly entered into between them and the 1st defendant.

The plaintiffs also contended that the 1st defendant had entered into the agreement of 6 May 1977 with the implied or express knowledge and consent of all the other beneficiaries in the estate. Here again I came to the conclusion that there was insufficient evidence to sustain the plaintiffs' contention. On the contrary the evidence of the beneficiaries which I accepted was that the 1st defendant had never consulted them before he entered into the agreement with the plaintiffs nor had the beneficiaries given their consent to the agreement. By a distribution order made by the Collector on 12 March 1979 the deceased wife's share in the land was distributed to the first six defendants according to their share entitlement and on 19 March 1979 these shares were transferred and registered in the respective names of the six defendants under the hand of the Registrar of Titles. On 21 March 1979 the six defendants entered into an agreement to sell all their land to the 7th defendant.

The plaintiffs did not strictly comply with the agreement of 6 May 1977 nor did they comply with certain provisions of the Mining Enactment in respect of this land. Under Clause 4 of the agreement the plaintiffs were required to supply to the 1st defendant the prospecting results of the land but according to the evidence of the 1st defendant and of one of the plaintiffs' own witnesses (PW3) only the option letter was given to the 1st defendant but not the boring results. This option letter dated 10 May 1977 was given to the 1st defendant a mere four days after the signing of the agreement on 6 May 1977. The plaintiffs had in fact commenced boring even before the agreement was signed and they failed to give at least one week's notice of their intention to do so to the Senior Inspector of Mines as required under s. 48(i) of the Mining Enactment. The plaintiffs also failed to supply the results of their prospecting operations to the Senior Inspector and to the Director of Geological Survey as required under s. 57(i)(b). Non-compliance of ss. 48(i) and 57(i)(b) are offences punishable under s. 123 of the Mining Enactment.

However I do not agree with the submission advanced by Counsel for the defendants that the non-compliance of ss. 48(i) and 57(i)(b) of the Mining Enactment taints the agreement of 6 May 1977 with illegality. There is no nexus between the agreement and the Mining Enactment and therefore any contravention of the Mining Enactment by either party cannot affect the agreement. There is nothing illegal in the agreement. Only that it cannot be enforced because of the lack of capacity on the part of one of the parties to enter into that agreement.

I accepted the evidence adduced on behalf of the defence. The 1st defendant aged 86 years was however not able to explain satisfactorily a part of his testimony where he said that he had at no time handed over the title deeds of the two pieces of land to the plaintiffs. This cannot be true. Here I would accept the evidence of the general manager of the plaintiff company (PW1) that the 1st defendant handed over the title deeds to him to enable him to prepare the agreement which sets out all the particulars of the two pieces of land. PW1 also produced photostat copies of the title deeds which he said he had taken in his office before returning them to the 1st defendant to enable the 1st defendant to apply for Letters of Administration of his wife's estate. In the light of this evidence the 1st defendant's evidence cannot be true that he never at any time parted with the title deeds.

However from my observation of this witness I formed the impression that he was not telling a deliberate lie but rather that he honestly believed that he really had not given the title deed to any person. I think he was a truthful witness but was making an honest mistake on this point.

In the event I held that the plaintiffs had failed to prove their case against the defendants and I accordingly dismissed their claim with costs. As for the counterclaims I ordered that the agreement of 6 May 1977 be rescinded, the 7th defendant be declared as the registered owner of the two pieces of land free from all encumbrances and that the caveat lodged by the plaintiffs over the land be removed forthwith. There was insufficient evidence to award damages as counterclaimed by the defendants and I therefore awarded no damages and no costs on the counterclaims.

Also found at [1983] 1 CLJ 304